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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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SPECIAL SERVICES FEES
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Docket No. MC96-3

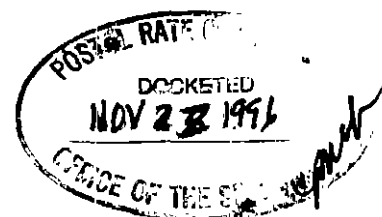
**MAJOR MAILERS ASSOCIATION'S RESPONSE TO
UNITED STATES POSTAL SERVICE'S "SUPPLEMENTAL COMMENTS"
TO MOTION TO STRIKE MMA WITNESS BENTLEY'S "NEW ANALYSIS"**

Major Mailers Association asks the Commission to deny the Postal Service's request to strike (1) OCA's cross-examination of MMA witness Bentley (Tr. 6/2008-11) and (2) three related documents (Exhibits OCA/MMA-XE-1 through XE-3, Tr. 6/2039-41).

INTRODUCTION

The Postal Service's motion seeks to strike MMA witness Bentley's testimony, during cross-examination, that a Commission-approved methodology and the Postal Service's substitute methodology are about "a billion dollars apart" (Tr. 6:2009-10). Mr. Bentley first advanced this conclusion in his direct testimony, illustrated with PRC-LR-1 and LR-2 data. After the Postal Service's cross-examination challenged Mr. Bentley's right to refer to PRC-LR-1 and LR-2, Mr. Bentley noted that his conclusion is also corroborated by data from Docket No. R94-1.

The Postal Service's attempt to strike Mr. Bentley's references to the R94-1 data is groundless. By its own cross-examination, the Postal Service "clearly opened the door to" the R94-1 data (See *United States v. Lowenberg*, 853 F.2d 295, 299



(5th Cir.))¹, and the Service cannot complain because Mr. Bentley "quickly stepped through the open door." (See *Birns v. Perini*, 426 F.2d 1288, 1290-91 (6th Cir.))²

In any event, the Commission's Special Rules of Practice specify that motions to strike are not to be used as "substitutes for...rebuttal evidence" (Rule 1.C). If the Service disagrees with Mr. Bentley's conclusion, the Service can avoid any prejudice by producing rebuttal evidence about its version of the cost differences between the two methodologies. Of course, such rebuttal would necessarily provide the information requested by Orders No. 1120, 1126 and 1134.

Lastly, the Service's motion to strike ignores the Commission's Rule that "relevant and material evidence which is not unduly repetitious or cumulative *shall* be admitted." (Rules of Practice §31(a). Italics supplied.)

DISCUSSION

A. The Postal Service's Own Cross-Examination Opened the Door To Use of the R94-1 Data

The crux of this dispute is the Postal Service's refusal to disclose its costs according to the Commission-approved methodology for attributing city carrier delivery expense. In his direct testimony, Mr. Bentley concluded that the dollar consequences of using the Postal Service's methodology--instead of the Commission methodology--are "huge," about a billion

¹ Cert. denied, 489 U.S. 1032 (1988).

² Cert. denied, 402 U.S. 950 (1970).

dollars (Tr. 6:1893, 1895-96).

This conclusion was contained in the draft of his testimony that Mr. Bentley prepared before the Commission issued PRC-LR-1 and LR-2. At that time, Mr. Bentley illustrated his conclusion with data from Docket No. R94-1 (*Id.* at 6:2042). After the Commission issued PRC-LR-1 and LR-2, Mr. Bentley revised his testimony to substitute the PRC-LR-1 and LR-2 data for the R94-1 data. Although both sets of data supported "the same conclusion," Mr. Bentley chose to use the 1995 data from PRC-LR-1 and LR-2 solely because it is more recent than Docket No. R94-1's 1994 data (*Id.* at 2044-45).

In its interrogatories, the Postal Service challenged Mr. Bentley's right to use PRC-LR-1 and LR-2. And so Mr. Bentley assembled data from Docket No. R94-1 and brought them to the hearing room. At the hearing the Postal Service continued its attack on Mr. Bentley's testimony by designating its interrogatory responses as written cross-examination and by oral cross-examination. Following this, OCA asked Mr. Bentley whether his conclusion was corroborated by data "independent of the library reference" (*Id.* at 6:2009). Responding, Mr. Bentley said "yes"--and he cited the data from Docket No. R94-1 and produced the related documentation.

MMA's position is that "the Postal Service has opened the door to this" by its cross-examination (*Id.* at 2011).

This "open-door doctrine" haunts all cross-examiners. In

Birns v. Perini, 426 F.2d 1288, 1290-91 (6th Cir.),³ the State prosecutor did not and could not question a policeman about certain improperly-acquired evidence of a prior illegal incident. But the defendant made the mistake of asking the policeman a question about the prior incident during cross-examination, and "the State quickly stepped through the door" by having the policeman elaborate the prior illegality. The Court of Appeals upheld the State's action as proper. See also *United States v. Lowenberg*, 853 F.2d 295, 299 (5th Cir.)⁴ ("The cross-examination...clearly opened the door to the government's follow-up question...").

In these court cases, criminal defendants went to jail when their lawyers' cross-examination opened the door to otherwise inadmissible evidence. Especially under the "more relaxed" rules of evidence in administrative agencies (4 Stein, Administrative Law §28.01 (Matthew Bender)), the open-door doctrine is effective here to justify the admission of evidence invited by the Postal Service's cross-examination.

**B. The Right To File Rebuttal Testimony
Negates Any Claim That the Timing of the
Bentley Testimony Prejudices the Service**

If the Commission grants the motion to strike, the Service will avoid the need to contest Mr. Bentley's testimony by means of rebuttal testimony. That would, however, circumvent the Commission's warning, in its Special Rules of Practice (§1.C),

³ Cert. denied, 402 U.S. 950 (1970).

⁴ Cert. denied, 489 U.S. 1032 (1988).

that "motions to strike...are not substitutes for...rebuttal evidence."

Does the Service really disagree with Mr. Bentley's testimony--in both his direct and cross-examination testimony--that the dollar difference between the two methodologies is about \$1 billion? If so, it should be put to the test of answering Mr. Bentley's testimony by presenting rebuttal evidence--evidence of the Service's own estimate of the dollar difference.

The Postal Service's opportunity to file rebuttal negates any claim that the Service is prejudiced by the timing of Mr. Bentley's cross-examination testimony. (Cf. 5 U.S.C. §556(e).)⁵

**C. The Postal Service's Contention That
the Agency Lacks Ample Time In Which
To Prepare Rebuttal Is Lacking In Merit**

There is no merit to the Service's complaint (Suppl. Comments, pp. 1-2) that it lacks time in which to prepare rebuttal. Mr. Bentley's testimony is an updated version of his testimony in Docket No. R94-1 (Tr. 13A:6082-84) that:

My comparison, which is Exhibit MMA-1F,...indicates that compared to the Service's new carrier-cost attribution technique, the Commission's methodology will cause a significant increase in total attributable costs (almost \$1 billion) and that this increase (on a relative basis) is greater for third-class mail (57%) than for First-Class Mail (45%).

The Service has been familiar with Mr. Bentley's thesis for twenty-seven months. In both Docket No. R94-1 and this

⁵ 5 U.S.C. §556(e) is the provision of the Administrative Procedure Act that allows an agency to rest its decision on "official notice of a material fact not appearing in the evidence in the record" so long as the agency provides the parties with "an opportunity to show the contrary."

proceeding, the Service has also had the opportunity to study Commission-issued library references on this same subject. During this period, the Service has had more than enough time to familiarize itself about this issue and to be able to produce rebuttal testimony.

The Postal Service's real objection to filing rebuttal testimony is not based upon any lack of time. In order to rebut Mr. Bentley--and his estimate of a \$1 billion difference in the two methodologies' results--the Postal Service would have to present the information it has been refusing to disclose. It would have to show its costs according to the Commission's methodology, as well as its own.

That is precisely the information that the Commission has been ordering the Service to provide (Orders Nos. 1120, 1126, 1134). In order to avoid disclosing that information, the Service wants to erase Mr. Bentley's testimony instead of rebutting it.

**D. The Alleged Inability To Understand
Mr. Bentley's Documentation Is the
Result of the Service's Own Actions**

The Service also asserts that it lacks time to prepare rebuttal because Mr. Bentley's analysis presents "a number of issues requiring explanation or clarification" (Suppl. Comments, pp. 2-4). Even if the Service's alleged puzzlement is genuine, it is the consequence of the Service's own actions.

During Mr. Bentley's cross-examination, when the Postal Service first objected to the testimony about the R94-1 data, MMA

counsel offered to provide the Postal Service with all Mr. Bentley's documentation, as well as to make Mr. Bentley available for additional interrogatories and cross-examination (Tr. 6:2011-13, 2037). In addition, during redirect examination, MMA counsel offered to have Mr. Bentley explain his cross-examination exhibits, OCA/MMA-XE-1 through XE-3 (*Id.* at 2042-43). The Postal Service, which declined these offers (*Id.* at 2029-31, 2043), cannot now complain that it lacks the information that could have been provided.

In any event, on November 22, MMA counsel sent the Postal Service a letter (Attachment A hereto) that renews the offer to provide all Mr. Bentley's calculations and workpapers and to have Mr. Bentley available for formal or informal data conferences. MMA also promised that Mr. Bentley will accept written questions, to which he will respond promptly by facsimile. In addition, as a first installment, MMA sent the Postal Service copies of all the documents which Mr. Bentley had with him on the witness stand. This offer is ample to dispel any genuine puzzlement.

**E. The Postal Service's Remaining
Objections Are Without Merit**

The Postal Service expresses a concern that Mr. Bentley's analysis may have relied upon extra-record materials from Docket No. R94-1 (Suppl. Comments, p. 4). The Postal Service could have asked Mr. Bentley about this when it cross-examined him again following OCA. (Tr. 6:2034-36, 2044-46). If the Postal Service had done so, Mr. Bentley would have affirmed that he used only record materials from that proceeding.

The Service also argues that Mr. Bentley's "new analysis...directly contradicts...his original testimony, and thereby raises the issue whether Mr. Bentley is recanting that earlier testimony" (Supp. Comments, p. 4). But Mr. Bentley testified that his R94-1 computations (discussed in cross-examination) confirm the conclusions expressed in his direct testimony (Tr. 6:2011). And that is plainly so, for both sets of calculations "allowed [Mr. Bentley] to have the same conclusion" (*Id.* at 2044)--namely that the dollar difference between the Commission-approved methodology and the Service's methodology "is consistently in the billion dollar range" (*Id.* at 2009-11).

The Service's next contention is that Mr. Bentley's analysis is "problematic and outdated" insofar as it uses 1994 data (Suppl. Comments, pp. 5-6). It is true that the 1995 data used in PRC-LR-1 and LR-2 is more current than the 1994 data from Docket No. R94-1. But since the Postal Service contests Mr. Bentley's right to consider the 1995 data, it cannot complain about Mr. Bentley's consideration of the next most recent data, from 1994.

Lastly, the Postal Service argues that "counsel for MMA most certainly did not lay an adequate foundation for admission of [OCA/MMA-XE-1 through XE-3] into the record" (Suppl. Comments, pp. 6-7). These documents were offered for the record as ancillary to Mr. Bentley's responses to OCA's cross-examination (Tr. 6:2013). On redirect examination, Mr. Bentley identified OCA/MMA-XE-1 through XE-3 as the documents to which he referred

in replying to OCA counsel, and that they formed the basis for the statements that he made during OCA's cross-examination (*Id.* at 2037). No additional foundation was required.

F. Motions To Strike Should Not Be Granted When the Evidence Is Relevant And Material And Is Of the Sort On Which Responsible Persons Are Accustomed To Rely In Serious Affairs

The Postal Service's motion also ignores that "administrative agencies apply rules of evidence considerably more relaxed than those used in the courts" (4 Stein, Administrative Law §28.01 (Matthew Bender)). In line with the Administrative Procedure Act (5 U.S.C. §556(d)), this Commission's own Rules of Practice direct that "relevant and material evidence which is not unduly repetitious or cumulative *shall* be admitted." (Rules of Practice §31(a). Italics supplied.)

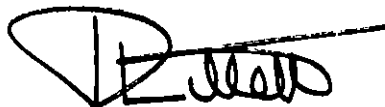
In layman's terms, as a famous judge wrote, even evidence that is ordinarily excludable should be admitted if "the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." *NLRB v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir.)⁶(Hand, J.). Thus the Federal Energy Regulatory Commission (FERC) regularly denies motions to strike testimony unless the agency concludes that the evidence is not of "the kind that would affect reasonable and fair-minded persons in the conduct of their affairs." *Bluestone Energy*

⁶ Cert. denied, 304 U.S. 576 (1938).

Design, Inc. 75 FERC ¶ 63,022 (1996) (ALJ. Birchman).⁷

FOR THE FOREGOING REASONS, MMA asks that the Commission deny the Postal Service's motion to strike (1) OCA's cross-examination of MMA witness Bentley (Tr. 6/2008-11) and (2) the three related documents (Exhibits OCA/MMA-XE-1 through XE-3, Tr. 6/2039-41).

Respectfully submitted,



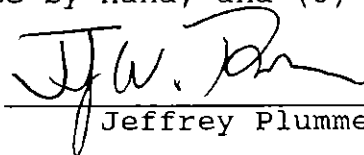
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November 25, 1996

Counsel for MMA

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document (1) upon the U.S. Postal Service by facsimile, (2) upon the Office of Consumer Advocate by hand, and (3) upon the other parties by First-Class Mail.



Jeffrey Plummer

November 25, 1996

⁷See also *Utah Power and Light Co.*, FERC Dkt. No. ER83-427-000 (May 7, 1984) (ALJ Zimmet) (denying motion to strike testimony because hearsay arguments have no place in an administrative proceeding); *Paiute Pipeline Co.*, FERC Dkt. ER 96-6-000 (Feb. 8, 1994) (ALJ Grossman) (denying motion to strike witness' references to statements made by FERC Chairman on the grounds that the motion "goes to the weight to be accorded to [the Chair's] comments not their admissability"), both unreported decisions that are summarized in I Herman, FERC Practice & Procedure Manual, ¶ 509.22 (Washington Thompson Publishing).

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November 22, 1996

BY FACSIMILE

Susan M. Duchek, Attorney
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FAX: (202) 268-5402

Dear Susan:

I want to renew my offer, made at last Tuesday's hearing (Tr. 6:2011, 2013), to provide the Postal Service with any additional information it desires regarding (1) MMA witness Bentley's statements made during OCA's cross-examination and (2) Mr. Bentley's computations underlying those statements and Exhibits OCA/MMA-XE-1 through OCA/MMA-XE-3 (Tr. 6:2008-11, 2039-41).

In addition to being available for recall at the hearings, Mr. Bentley will, upon request, provide the Service with all his calculations and workpapers. Mr. Bentley is also available at any time, in person or by telephone, for formal or informal data conferences to answer any questions the Service has about his answers to OCA, the three cross-examination exhibits and his methodology, sources, computations and workpapers. Mr. Bentley will accept formal or formal written questions or interrogatories regarding these matters; he will respond promptly by facsimile.

This offer is effective immediately and does not await the Commission's resolution of the Service's Motions to Strike.

As you will recall, at the hearing I offered to provide you with certain documents which, for a time, you thought would be sufficient (Tr. 6: 2011-13). Even though you later reconsidered (*Id.* at 2029-31), I am enclosing copies of the documents that Mr. Bentley had with him on the witness stand, with additional footnotes to sources added. I'm also enclosing pages from Docket No. R94-1 materials from which Mr. Bentley derived numbers. I am sending these materials to you as a first installment.

Please advise me if the Service wants to schedule any meetings or data conferences with Mr. Bentley. The Service may send written questions or interrogatories directly to Mr. Bentley, with a copy to me. (Mr. Bentley's facsimile number during the week is 703/281-0677, except that this coming weekend please send Mr. Bentley a duplicate facsimile at 757/220-3215.)

Cordially,



Richard Littell